Hearing Date: January 19, 2011 at 10:00 a.m. (Prevailing Eastern Time)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: NEW YORK CITY OFF-TRACK BETTING CORPORATION, Debtor.	:	Chapter 9 Case No. 09-17121 (MG)

REPLY OF DISTRICT COUNCIL 37, LOCAL 2021 TO RESPONSES TO ITS MOTION PURSUANT TO SECTION 926(a) OF THE BANKRUPTCY CODE TO PURSUE CAUSES OF ACTION TO AVOID AND RECOVER FRAUDULENT TRANSFERS MADE TO NEW YORK RACING ASSOCIATION, YONKERS RACING CORPORATION, EMPIRE RESORTS, INC., MONTICELLO RACEWAY MANAGEMENT, INC., MONTICELLO RACEWAY, FINGER LAKES RACING ASSOCIATION, INC., DELAWARE NORTH COMPANIES, DELAWARE NORTH COMPANIES GAMING & ENTERTAINMENT, INC., VERNON DOWNS AND TIOGA DOWNS

District Council 37[1], by its undersigned counsel, in further support of its motion dated December 22, 2010 for appointment of a trustee pursuant to section 926(a) of the Bankruptcy Code (the "Trustee Motion") and in reply to the responses filed by the Debtor and certain of the

[1] Unless otherwise defined herein, capitalized terms have the meanings set forth in the Trustee Motion.

New York Tracks (collectively, "Respondents") to its Trustee Motion, hereby submits this Reply and represents as follows:

PRELIMINARY STATEMENT

1. Respondents fail to refute any of the basic facts that warrant appointment of a section 926 trustee. Whether expressly or tacitly, all concede:

- NYC OTB made unreimbursed transfers of hundreds of millions of dollars to the New York Tracks while it was financially distressed, transfers that drove the Debtor ever deeper into insolvency;
- NYC OTB has shut down and will not pursue fraudulent transfer actions against the parties who received such transfers;
- Hundreds of NYC OTB retirees who did deliver real value to the Debtor (as well as many other creditors, some of whom have joined in the Trustee Motion) are being left with nothing; and
- Section 926(a) of the Bankruptcy Code expressly empowers this Court to appoint a trustee to pursue fraudulent transfer claims.

2. Unable to deal with those facts, Respondents throw up a variety of legal arguments as to why, regardless of section 926(a), the Court lacks power to redress this injustice. None of those arguments withstands scrutiny. The argument of certain Respondents that the Trustee Motion somehow offends sections 903 and 904 of the Bankruptcy Code founders on the fact that the relief requested in no way interferes with the State's control of the Debtor or the Debtor's control of its property or revenues. The argument of other Respondents that the Trustee Motion should be denied because dismissal of the Debtor's chapter 9 case is "inevitable" and

there is no mechanism for a section 926 trustee to administer recoveries ignores the fact that dismissal is discretionary with the Court and that failure to dismiss the case will not have any meaningful effect on the Debtor. And the protest of some of the New York Tracks that they in fact provided fair value to NYC OTB is, at best, a highly contested factual contention that will have to be tested in the eventual litigation of a fraudulent transfer claim. We show below that none of these arguments provides a sound reason that the Court should not exercise its power to appoint a trustee.

ARGUMENT

(a) State-Mandated Payments to the New York Tracks Are Subject to Avoidance as Fraudulent Transfers

3. The New York Tracks repeatedly stress that payments received from NYC OTB were mandated by statute as if that fact somehow immunizes those payments from avoidance. It does not. Although the Bankruptcy Code provides statutory safe harbors to exempt many types of transfers from chapter 5 avoidance, none protects a transfer merely because it was made pursuant to state statute. One of the New York Tracks candidly acknowledges that payments mandated by statute can be recovered as preferences. Yonkers Racing Corporation's Objection to Trustee Motion [Docket No. 270] at p.7, n.7; *see also Official Comm. of Unsecured Creditors of 360networks (USA) Inc. v. PUC* (*In re 360networks (USA) Inc.*), 316 B.R. 797, 800 (Bankr. S.D.N.Y. 2004) (preference action against state agency to recover state-mandated fee did not offend notions of sovereign immunity). If sovereign immunity does not protect payments made pursuant to statute to states and local governments, it surely cannot protect statutory payments made to private entities like the New York Tracks.

4. Unable to find any express statutory exemption, the New York Tracks try to conjure an implicit protection from Bankruptcy Code section 903. The Trustee Motion, however, does not implicate section 903. Section 903 only provides in relevant part:

> This chapter does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures for such exercise, ...

Simply stated, the Trustee Motion does not seek to affect in any way the State's exercise of control over the now inactive NYC OTB. Nor does it seek to affect any "political or governmental powers" of NYC OTB, powers of a type that the Debtor never exercised in any event.

5. Equally unavailing is the New York Tracks' resort to Bankruptcy Code section 904. Section 904 provides in relevant part:

> Notwithstanding any power of the court, unless the debtor consents or the plan so provides, the court may not, by any stay, order, or decree, in the case or otherwise, interfere with –
>
> (1) any of the political or governmental powers of the debtor; [or]
>
> (2) any of the property or revenues of the debtor; . . . .

Once again, Respondents' argument does not find support in the language of the statute they rely on. The relief requested will not interfere with any of the Debtor's "political or governmental powers" (if ever there were such powers), or its property or revenues. To the extent that recoveries from any fraudulent transfer actions become property of the Debtor, it will be up to the Debtor to distribute such funds in accordance with applicable law.

6. The New York Tracks' interpretation of section 904 fundamentally misapprehends the purpose of the statute. Commentary makes clear that section 904 is intended to prevent court interference with ongoing governmental operations. *See* Norton Bankr. L &

Prac § 90:1 (2010 Thomas Reuters) ("Because the purpose of municipalities (i.e., police protection, fire protection, sewage, garbage removal, schools, hospitals) is to provide essential services to residents, it is crucial that Chapter 9 relief allow these entities enough flexibility to remain viable.") Since NYC OTB acknowledges that it is shut down and not operating, the appointment of a trustee cannot possibly interfere with the operations of a municipality.

7. Moreover, the insistence of certain of the New York Tracks that section 904 requires the Debtor's consent to appointment of a section 926(a) trustee would all but write section 926 out of the Bankruptcy Code. Section 926(a) specifically confers authority upon this Court to appoint a trustee "[i]f the debtor refuses to pursue causes of action. . . ." 11 U.S.C. § 926(a) (emphasis added). The very purpose of section 926(a) is to enable this Court to act when the Debtor, as here, is rendered powerless because of political relationships such that it cannot seek the recoveries it rightfully should. That grant of power is not, as certain Respondents would have it, a contravention of section 904, but a Congressionally mandated exception to chapter 9's general prohibition against the appointment of trustees. *See In re Richmond Unified School Dist.*, 133 B.R. 221, 225 n.5 (Bankr. N.D.Cal. 1991) (recognizing that a trustee cannot be appointed in a chapter 9 case except pursuant to section 926 for the purpose of prosecuting avoidance actions).

(b) **The Debtor's Motion to Dismiss the Case Does Not Preclude Appointment of a Trustee**

8. Nor is there merit in Respondents' contention that the mere pendency of the Debtor's motion to dismiss the chapter 9 case somehow prevents the Court from exercising its section 926 power to appoint a trustee. Contrary to certain Respondents' suggestion, dismissal is

not mandatory.[2] Bankruptcy Code section 930(a) provides only that the Court "may" – not must – dismiss a case for cause. 11 U.S.C. § 930(a) (emphasis added). The existence of valid fraudulent transfer actions that the Debtor refuses to prosecute itself, as a matter of simple equity, amply justifies this Court's exercise of the discretion it was granted under the statute to deny dismissal of the case at this time and to ensure prosecution of these claims.

9. That conclusion is all the more compelled in this case where the Debtor has shut down and ceased all operations. Under these circumstances, dismissal of the case is little more than an administrative formality, and therefore, as the Debtor itself acknowledges, the relief requested here "would have little effect on NYC OTB." Debtor's Response to Trustee Motion at 3 [Docket No. 275].

10. Contrary to the Debtors' suggestion (*see id.* at 4), the Union does not contemplate that a trustee would retain and distribute any recoveries in a fraudulent conveyance action. Rather, and completely consistent with the statutory scheme of chapter 9, such recoveries would be available to the Debtor to distribute in compliance with applicable law.

(c) **Respondents' Other Arguments Are Without Merit**

11. The remainder of the New York Tracks' arguments – principally including that the transfers were made for reasonably equivalent value – are actually potential defenses to the fraudulent conveyance actions themselves, defenses that raise hotly disputed issues of fact that will have to be litigated in the future. Such disputed defenses cannot bar the requested appointment of a section 926 trustee.

12. Nevertheless and in response to those contentions, DC 37 points out that the one decision principally relied upon by certain of the New York Tracks, *Suffolk Reg'l Off-Track*

[2] Dismissal of a Chapter 9 case is mandatory, pursuant to section 930(b) of the Bankruptcy Code, only when "confirmation of a plan under this chapter is refused." (emphasis added). Since the Debtor has decided not to pursue confirmation of its plan, the Court has not "refused" to confirm the plan.

Betting Corp. v. New York State Racing and Wagering Bd. (*In re Suffolk Reg'l Off-Track Betting Corp.*), 900 N.E.2d 970 (N.Y. 2008), in no way determined whether payments made by an Off-Track Betting entity were made fair consideration or reasonably equivalent value standard within the meaning of the fraudulent conveyance statutes. Indeed, the fact that legislation proposed in the State legislature in December, 2010, with the consent of the New York Tracks, to remedy NYC OTB's ills severely reduced the payments under the statutory distribution scheme to the NY Tracks seriously undercuts any contention that the payments in current form represented fair consideration or reasonably equivalent value to the Debtor.

13. The New York Track Respondents' suggestion that these fraudulent conveyance causes of action can be pursued outside of the Bankruptcy Court should likewise be rejected. As shown in the Trustee Motion, these actions are rooted in bankruptcy law, and, given that the transfers were made under the direction of the state, would be more fairly considered by a federal, rather than a state, court.

14. More fundamentally, the retirees represented by the not-for-profit Union are manifestly not in a position to prosecute individual fraudulent transfer actions. To say that they should pursue such claims in state court without a trustee is essentially to deny them any relief at all.

15. Most significantly, it was the Debtor, not the Union, that sought relief under a federal statute and cloaked itself in the protections of the statute. Now the retirees and other creditors are entitled to the benefits afforded them by that same statute.

WHEREFORE, DC 37 respectfully requests that this Court deny any objections to the Trustee Motion and grant the Trustee Motion and such other and further relief as is just and proper.

Dated: New York, New York
January 18, 2011

Respectfully submitted,

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